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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 45

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD G. AUGENBLICK

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH N. JUHL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

I

RESPONDENT AUGENBLICK'S COUNTERSTATEMENT OF THE CASE AND HIS ARGUMENT INACCURATELY POSTERY CRITICAL ASPECTS OF THE FACTUAL RECORD

In our main brief (at p. 61) we contended that "the legal errors which the Court of Claims purported to find [in *Augenblick*] were closely tied to its view of the facts of the case." The soundness of this observation is underscored by the discussion of the underly-

ing facts provided in respondent Augenblick's brief. In an attempt to support the conclusion of the Court of Claims that the procedure at his court-martial was fundamentally defective, Augenblick at several points takes a view of the facts which is not supported by the record. We discuss these factual matters not because we think a detailed review of the record is appropriate,[1] but rather to show that the Court of Claims, like respondent Augenblick here, while purporting to draw legal conclusions on the basis of undisputed evidence, reached its conclusion that various legal errors had occurred only after drawing dubious, and frequently insupportable, factual inferences, in violation of even the most generous conception of the proper scope of collateral review.

(a) *Existence of "substantially verbatim" "stenographic" notes.* Respondent Augenblick several times asserts that Mendelson's handwritten notes contained "what Hodges said" in "language that Hodges used." (Brief pp. 9 n.9, 13). If this reading of the record were correct, then the notes probably were a "substantially verbatim" and contemporaneous statement producible under the Jencks Act. 18 U.S.C. 3500(e). But the record supports no such characterization of the notes.

Augenblick relies on two passages from the record (see Brief, p. 9 n.9). If the full passages are read, however, it becomes apparent that the passages refer,

[1] Our principal position remains, of course, as we have insisted throughout, that the Court of Claims was exceeding its statutory role by making *any* collateral re-examination of Augenblick's court-martial.

not to any notes that recorded "contemporaneously" a witness's oral statement (18 U.S.C. 3500(e)) but to a memorandum which Agent Mendelson typed up several hours after the interview, utilizing "Navy terminology" rather than Hodges' exact words.[3] The handwritten notes rather than the typed memorandum, were the notes that Augenblick sought to obtain at the court martial; and these were the notes that were the subject of the Court of Claims' ruling. There is

[3] We set forth in full the two passages from which Augenblick quoted in his brief (at p. 9 n. 9). The portions omitted in the brief are italicized.

The first passage is from the testimony of Mendelson at the additional pre-trial investigation (A. 132–133):

> I do recall that the information that was given at this interview was later more or less typed up in—you might say a memo report from my own information just setting such things as what time I was called, what time I arrived there, and what Hodges said. *But in putting down what Hodges said, I used Navy terminology briefly, which would not—in other words it wasn't verbatim—of what Hodges said, in my little memo.*

The second passage is from a statement by prosecuting counsel at the court martial (A. 210):

> *I talked to Mr. Mendelson yesterday after we left here and he said there are no handwritten notes—he never had any. But he said there is a typed memorandum that he made later on on the 12th of January during working hours, the interview having occurred, as you recall, early in the morning, and I have been able to locate that memorandum. It is not signed; he says he has it in—or typed it in his own hand.* And mostly he tells me it has to do with what he did that day—that is to say, I was called at such and such a time, at such and such a time I went to the Gun Factory and so on, but it does, he tells me, summarize, or at least refer to the language that Hodges used or some of the things that he said. I'll get on the witness stand and testify to that if you desire, but I—that is what I'm told the situation is.

no evidence in the record that the "rough notes" that Mendelson "jot[ted] down" (A. 132) contained "what Hodges said" in "language that Hodges used."[3]

(b) *Attacks on Mendelson's veracity.* In an attempt to show that there was an unconstitutional abuse of discretion in the law officer's refusal to re-call Agent Mendelson from Norfolk, Augenblick suggests several reasons, accepted by the court below, why Mendelson's return was indispensible for a fair trial. First, in order to undermine the credibility of Mendelson's pre-trial testimony that he did not recall whether a tape of the Hodges interview had been made (A. 137, 141), Augenblick asserts that Mendelson "consulted with" Agent James before James made a recording of the interview (Brief, pp. 15, 28 n.20, 42). There is no support in the record for this statement. The record shows only that Mendelson knew of James' presence in the building when the interview was held, in a room from which a recording could have been made (A. 137-139). When Agent James was asked whether he had consulted with Mendelson regarding a recording he responded that he could not recall whether he had discussed that subject with Mendelson, explaining that it was "normal procedure" for him to record an interrogation.[4]

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[3] We discuss *infra*, pp. 21–22, Augenblick's repeated assertions that a separate violation of the Jencks Act took place when the law officer failed to order the notes produced for inclusion in the record open to appellate review.

[4] The following colloquy occurred between Agent James and defense counsel (A. 147):

"Q. Assume before the interrogation commenced, Mr. Mendelson having taken jurisdiction by virtue of being from

Nor does the passage Augenblick cites (Brief, p. 15) give any support for his contention that Mendelson had consulted with James about recording the interview (see A. 217). Thus, the implication that Augenblick seeks to create—that Mendelson was consciously lying when he testified that he had no knowledge of whether the interview was recorded—is not founded on the record. The record is completely consistent with Mendelson's testimony that he could not in fact recall whether a recording was made, and the law officer was justified in concluding that Mendelson could shed no new light on the existence or disposition of the tape had he been recalled to testify for a third time.

Augenblick makes a further attempt to impugn Mendelson's pre-trial testimony (upon cross-examination under oath) that he did not recall ever receiving a tape of the Hodges' questioning. Respondent argues: "Mendelson then denied any recollection of having possession of the [Hodges] tape (A. 141), though his superior, Agent Fason subsequently brought out the truth—that he had given the tape to Mendelson (A. 237–8)" (Brief, p. 42). The record reveals, however, that the "truth" of the matter is more complex. Fason testified that he gave some boxes of tapes to Mendelson (A. 237–238)—which Mendelson never denied.

ONI Headquarters itself, did he give you instructions to make this recording or was this on your own or how did that come about?

A. This is pretty much normal procedure. I won't say that he didn't say not to record it, but at the same time, if he had not said anything I would have—it's usual routine.

But Eason also testified that he did not know what was on these tapes, that he did not see or hear these tapes, and that he had no knowledge whether there was in fact a tape of the Hodges interview (A. 154–155).[4]

In an additional attempt to undermine the sufficiency of Mendelson's testimony, Augenblick states (Brief, p. 42):

> Mendelson came to the Jencks issues in this case with a record of unreliability on the stand already clearly established. Mendelson's peregrinations from the truth with respect to whether he had taken the oath of police officer Round, as Mendelson testified he had and Round testified Mendelson had not, had caused the dismissal of a first court-martial called to try Commander Augenblick.[5] * * *

Again, the "truth" of the matter is more complex. Mendelson testified (A. 61, 63):

> I said, "Would you sign it." He did. Then I signed the swearing part of it, and that was to the best of my recollection the way this statement was obtained. I cannot actually remember,

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[4] Six years after the trial, the court below concluded from these circumstances, as respondent reports (Brief, p. 43 n. 30): "It was evident, we stress, from his earlier testimony that Mendelson was not a witness whose prior statements could be accepted at face value" (A. 324).

[5] Police officer Round's written statement had been in evidence at the pre-trial investigation that had led to the convening of the first court-martial. In *United States* v. *Samuels*, 10 USCMA 206, 27 CMR 280 (1959), it was held that introduction of unsworn written statements at the pre-trial investigation warranted reversal of a conviction. Accordingly, the question whether Round's statement was sworn was vital at the first court-martial.

but I'm sure that I did swear him in some fashion. He was well aware that these were sworn statements, because at the time of taking the second statement I reiterated the fact that this was a sworn statement and must be as accurate as he could recall the circumstances.

Q. You don't recall giving him any kind of an oath and having him swear to it. What is your recollection now? You say that you believe that is what transpired based on your customary procedure?

A. Right. I take hundreds of statements, and I try to keep them as close to what we call the book as possible. And I cannot recall right now exactly the mechanics of how I took the statement on January 13th. It's my assumption that I took it in this fashion from reading these two statements.

* * * * *

Q. You have no picture in your mind of his raising his hand or doing anything of that sort or saying "I so swear"?

A. I can't place it either way. I have no recollection either way.

Although police officer Round testified that "I never swore any oath" (A. 60), it seems an unfair exaggeration to charge Mendelson with deceit. The testimony of both men merely led to the conclusion that Mendelson had perhaps followed the slipshod practice—not uncommon among notaries public—of subscribing the jurat without requiring the affiant to take a formal oath.

Nor is it accurate to declare that the first court martial had been adjourned because of a finding, in respondent's words, that Mendelson's testimony was a

"peregrination from the truth" (Brief, p. 42). Rather, the law officer at the first court-martial ruled that "there was a question as to whether or not such statements were sworn" and that neither he nor the court had the legal capacity to resolve the question. It was simply because the matter was uncertain that it was necessary to refer the issue to the convening authority for appropriate consideration (A. 66–67).[1]

(c) *Significance of Airman Hodges' honorable discharge.* Respondent Augenblick repeats and amplifies the speculation of the Court of Claims that Hodges might have been offered an honorable discharge at the initial interview, in return for giving testimony for the prosecution:

> Since Hodges during the trial apparently expected to receive an honorable discharge, and subsequent to plaintiff's conviction was in fact honorably discharged from the Service, it was also very relevant for the accused to ascertain whether any inducement was offered or suggested, or other improper dealings had, during this first interrogation session.

---

[1] The record does not reveal the reasons which led the convening authority to dissolve the first court-martial and to convene a court of inquiry. However, there is no basis for concluding that the convening authority determined Mendelson's testimony to have been a "peregrination from the truth"; certainly, on the basis of Mendelson's own testimony he could have concluded that there was not sufficient evidence that Round's statement was sworn. That inadequacy would have been relevant to the sufficiency of the pre-trial investigation which, under Article 32 of the Uniform Code, 10 U.S.C. 832, is a pre-requisite to referral of a charge to a general court-martial. See note 6, *supra*, p. 6.

(A. 340, quoted at respondent's Brief, pp. 11–12.) Both the Court of Claims and respondent fail to point out that any such suspicion was repudiated by the *defense* at the court-martial. When the prosecutor called agent Connor—the OSI investigator who had questioned Hodges—and asked him what Hodges said at the initial interview, the defense objected that any answer would be hearsay (A. 279). In answer to the defense's objection, the prosecuting attorney stated that the purpose of the line of inquiry was to rehabilitate Hodges, in view of the imputation made previously during Hodges' cross-examination that he may have been motivated to testify by the prospect of the honorable discharge which his commanding officer had recommended (A. 280). Defense counsel replied (A. 280):

> I see no connection between a recommendation which his Commanding Officer stated he was going to make and any statements which he made to this OSI agent. I see no connection whatsoever [with] what he said that morning. That he was assured later by his Commanding Officer has no relevance whatsoever to the OSI Branch of the Air Force, and it is still hearsay to have this man repeat what someone told him.

The defense objection was sustained, and the testimony excluded (A. 282). Respondent Augenblick now states that "[t]he defense efforts to ascertain what transpired in Hodges' initial interview, specifically, whether any arrangement for the testimony of the principal prosecution witness had been made which could vitiate the force of Hodges' accusation, met with total and disastrous failure" (Brief, p. 12). But what the record reveals belies this insinuation. It was the

prosecution that was attempting to lay bare what had transpired in Hodges' initial interview and this endeavor was blocked by the defense—on the express ground that the initial interview had no relevance to the question of improper inducement.[8]

The foregoing discussions of the factual details underlying the Augenblick case should in no way be taken as indicating agreement that this Court—or the Court of Claims—should appropriately make such inquiries. We have attempted to set straight the record and to demonstrate that this case highlights the reasons why we believe Congress has not authorized the Court of Claims to engage in collateral review of court-martial records. Despite its disavowal, the opin-

[8] At trial, the defense's theory apparently was not that the inducement of an honorable discharge was offered Hodges during the initial interview in an effort to prod him into making damning accusations. Rather, in the original proceedings the defense argued that some promises might have been made the next morning, when he saw his commanding officer, or three weeks later when his commanding officer notified Hodges that he would recommend an honorable discharge (A. 260–261). Neither the Court of Claims, nor Augenblick's brief here, preserves this theory. The reason is apparent: Hodges' handwritten statement (A. 88–92)—which was consistent with his testimony at the court-martial and stated that Augenblick had committed oral sodomy—was given on the morning of the arrest, while Hodges was still in the custody of OSI agent Connor and before he saw his commanding officer (A. 109–114, 122–125). Thus any change in Hodges' story would have to have occurred while Hodges was still in OSI custody; and any improper inducement causing an alleged change would have to have come from the OSI, rather than later from Hodges' commanding officer. The silence of the record on *this* possibility must be charged to respondent, whose objection prevented exploration of whether there had been any untoward promises made during that first interview.

ion of the Court of Claims, as well as respondent's brief in this Court, makes clear that the finding that there had been a violation of due process turned on the lower court's assessment of Mendelson's credibility, of the importance of Hodges' testimony, and of the adequacy of the evidence concerning the tape and the written notes. The least that can be said is that the record supports a differing assessment of these matters, in the resolution of which the Court of Claims has neither special competence nor a superior vantage point.

There are, however, other issues that relate more fundamentally to the questions before this Court.

II

OUR JURISPRUDENCE RECOGNIZES A SETTLED DISTINCTION BETWEEN COLLATERAL PROTECTION OF LIBERTY AND OF MONETARY INTERESTS

Both respondents seem to regard it as anomalous that a man's right to collateral review of a court-martial depends on whether he is in custody, and thus entitled to petition for *habeas corpus*, or whether he can at the time complain only of financial injury. To the extent that this distinction presents an anomaly, it is one that is deeply rooted in the Constitution and the traditions of the common law. As this Court observed only last Term in explaining why *habeas corpus* may be sought only by those in custody: "Its province, shaped to guarantee the most fundamental of all rights, is to provide an effective and speedy instrument by which judicial inquiry may be had into the legality of the detention of a person." *Carafas* v.

LaVallee, 391 U.S. 234, 238 (footnotes omitted). See, also, *Peyton* v. *Rowe*, 391 U.S. 54, 58.

Thus, the "extraordinary prestige of the Great Writ, *habeas corpus ad subjiciendum*, in Anglo-American jurisprudence" as well as its "explicit recognition in the Federal Constitution" (*Fay* v. *Noia*, 372 U.S. 391, 399–400), give it a special status not enjoyed by the various forms of action seeking vindication of property rights—like the instant suits for back pay.* By granting a special constitutional status to the writ of *habeas corpus*, the Founding Fathers reaffirmed the tradition of Anglo-American law that restraint of personal liberty is a special type of harm, for which a special type of remedy must be available.

The Court of Claims' statement that "[l]iberty is of course important, but so are a man's career, his livelihood, his rights as a veteran, his status as a convicted criminal, and his reputation" (A. 317) is therefore wide of the mark. Even if the money judgments rendered in favor of respondents by the Court of Claims are viewed as affecting in some ways their reputations and careers—a proposition whose import is open to doubt—the fact remains that these are not the types of damage for which the common law and the Constitution guarantee a remedy. While the inci-

*For example, the doctrine of *res judicata* is clearly applicable to preclude successive attempts to litigate a claim for financial injury but has no application to *habeas corpus* or kindred remedies because "[c]onventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged." *Sanders* v. *United States*, 373 U.S. 1, 8.

dental detriments flowing from conviction may avoid dismissal for mootness when a state prisoner seeking *habeas corpus* or other form of collateral relief is released, this Court has in no way intimated that *habeas corpus* or other form of collateral relief may be applied for by one not in physical confinement at the time. See *Carafas* v. *LaVallee, supra.*[10] Although Congress has provided one specific remedy to ameliorate some of the consequences of wrongful conviction by the federal government—including damages resulting from loss of job and injury to reputation—Congress has determined that this "collateral" relief should be available only to those who have in the interim been found *innocent*. Even in such a case, damages may not exceed $5000. 28 U.S.C. 1495, 2513. In our view, this deliberate congressional judgment fixes the outer

[10] *Coram nobis* may be available to a person not in custody, in some circumstances. *United States* v. *Morgan*, 346 U.S. 502. But issuance of this writ; of course, is confined to the convicting court. The Uniform Code of Military Justice provides analogues to such a remedy: requests for a new trial or for suspension or remission of a sentence and/or forfeitures, under Articles 73 and 74 (10 U.S.C. 873, 874), remedies which are expressly excepted from the finality specified in Article 76 (10 U.S.C. 876); and resort to the correction board process (10 U.S.C. 1552, 1553), which has been construed as not affected by Article 76 (see 41 Ops. Att'y Gen. 49). As this Court recognized in *Carafas* v. *LaValle*, *supra*, 391 U.S. at 239, district courts are authorized by the habeas corpus statute, once their jurisdiction has been properly invoked, to grant all relief that law and justice may require. The Court of Claims can in no event, we believe, grant relief other than a money judgment. See Petition for a Writ of Certiorari in *United States* v. *King*, No. 672, this Term.

perimeter of a civil remedy for monetary or social injury due to conviction. The lines drawn are reasonable and well in keeping with our historical and constitutional scale of values.

III

CONGRESS IS NOT CONSTITUTIONALLY COMPELLED TO CONFER JURISDICTION ON AN ARTICLE III COURT TO ENTERTAIN ANY PARTICULAR MONETARY CLAIM

Respondent Augenblick argues that any interpretation of Article 76 as prohibiting back-pay actions to review court-martial convictions would be unconstitutional, since it would preclude access to an Article III court on constitutional questions. In effect, the contention is that the Constitution not only precludes Congress from suspending the writ of *habeas corpus,* but also requires it to create a back-pay remedy for servicemen in an Article III court, and forbids *its* suspension too. This imaginative notion that Congress was compelled by the Constitution not only to create inferior federal courts under Article III but also to entrust to them unlimited jurisdiction over every civil claim raising a constitutional issue is squarely rebutted by our constitutional history. While the general question of the power of Congress to define and limit the jurisdiction of the federal courts is complex and often presents difficult problems (see, generally, Hart and Wechsler, *The Federal Courts and the Federal System* (1953), 312–340), there are several reasons why there is no substantial constitutional

question presented by the particular limitation of jurisdiction embodied in Article 76.[11]

In the first place, the court-martial system and the Court of Military Appeals were established under the constitutional power of Congress "To make Rules for the Government and Regulation of the land and naval Forces." (Article I, § 8, cl. 14). This power has always been recognized as authorizing trial by court-martial, despite the specific guarantees of the right to trial by jury in Article III and the Sixth Amendment. *Dynes* v. *Hoover,* 20 How. 65; *Ex parte Reed,* 100 U.S. 13; see *Reid* v. *Covert,* 354 U.S. 1, 19. For the same reasons, there also can be little doubt that Congress has the power to establish an Article I court as the final *appellate* tribunal in court-martial cases,[12]

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[11] Neither Congress nor this Court has ever viewed the language or plan of Article III as necessitating creation of federal courts of unrestricted general jurisdiction, and Congress has never done so. We note, for example, that it was not until 1875 that Congress first gave district courts the authority to hear civil suits "arising under the Constitution", and then only—as now—subject to a minimum jurisdictional amount. See, generally, Hart and Wechsler, *supra,* at 727–733. And not until 1855 did Congress create the Court of Claims, with only very limited functions to assist it in processing claims against the sovereign. *Id.* at 109–114. The jurisdiction of that court in its present form was not created until the passage of the Tucker Act in 1887, ch. 359, 24 Stat. 505. And even the Court of Claims' status as an Article III court has been settled only within the last fifteen years. See Act of July 28, 1953, § 1, 67 Stat. 226; *Glidden Co.* v. *Zdanok,* 370 U.S. 530.

[12] In Public Law 90–340, 82 Stat. 178, Congress amended Article 67(a) of the Uniform Code of Military Justice, 10 U.S.C. 867(a), to provide explicitly that the Court of Military Appeals is a *court* established under Article I of the Constitution. The House Committee on Armed Services explained:

whose decisions are not subject to direct review by this Court. See *Crawford* v. *United States*, 380 U.S. 970 (leave to file petition for writ of certiorari to Court of Military Appeals denied.) It would be incongruous, we submit, to hold that Congress may provide for trial and appeal before Article I tribunals, but is somehow required to create, and forbidden to withdraw, collateral civil remedies nowhere given the explicit constitutional recognition accorded the writ of *habeas corpus*.

Moreover, the right of action here involved—a suit against the Government for back pay—is not a traditional common-law action, such as might conceivably be arguably included immutably within the grant of the "judicial Power of the United States", spoken of in Article III and in part conferred on the various Article III courts by Congress. Rather, in light of the well-established tradition that Congress may define the conditions under which the Government may be sued, a suit against the Government for back pay falls within the category of "matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which

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There has been some claim that the court, having been put under the Department of Defense for administrative purposes, is in effect an administrative agency. If it had such status, it would not be able to question any of the provisions of the Manual for Courts-Martial since the manual had been promulgated by Presidential order. The bill makes it clear that the Court of Military Appeals is a court and does have the power to question any provision of the manual or any executive regulation or action as freely as though it were a court constituted under Article III of the Constitution. [H. Rep. No. 1480, 90th Cong., 2d Sess., p. 2.]

are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." *Murray's Lessee* v. *Hoboken Land & Improvement Co.*, 18 How. 272, 284. Indeed, until Congress established the Court of Claims and that court became an Article III court, there was no way in which a claim for back pay could be presented to an Article III court—even if the claim turned upon a constitutional contention. Having established the right of action for back pay against the Government, Congress retained the power to redefine the action or limit its availability in light of other policies or procedures. Cf. *Lynch* v. *United States*, 292 U.S. 571, 582 (Brandeis, J.).[11]

Contrary to Augenblick's assertions (Brief, pp. 71–72), restricting collateral review of courts-martial to *habeas corpus* does not "destroy the essential role of [this] Court in the constitutional plan." Hart and Wechsler, *supra*, at 312. This Court, through its power to review judgments in *habeas corpus* cases, can and does exert ultimate control over the military's compliance with the Constitution in court-martial proceedings. There is no basis for speculating that the rules of constitutional law construed and developed

[11] Our discussion on this point has assumed *arguendo* that, prior to the provision for finality in the Articles of War and then in the Uniform Code, the Court of Claims had some power to inquire into constitutional claims in court-martial back-pay cases, a proposition with which we disagreed in our opening brief (pp. 43–54). Only if we are wrong on this question does the issue of "cutting off" resort to an Article III court arise in these cases.

by this Court are deliberately ignored by the military in cases where the defendant happens not to receive a prison sentence.[14] Indeed, statutory provisions which limit access to the federal courts to persons claiming a specified degree of harm have not heretofore been considered unconstitutional.[15]

IV

THE "FINALITY" OF COURT-MARTIAL PROCEEDINGS DOES NOT TURN ON WHETHER THERE HAS ACTUALLY BEEN REVIEW BY A BOARD OF REVIEW OR THE COURT OF MILITARY APPEALS OR THE OPPORTUNITY FOR SUCH REVIEW

Respondent Juhl argues that his court-martial conviction should not be accorded finality as against Court of Claims re-examination because it was not

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[14] For the offenses charged, Augenblick could have been imprisoned for up to five years, while Juhl faced up to sixteen years and three months in prison—terms of imprisonment that would have been sufficient to guarantee that *habeas corpus* would be available after completion of appellate remedies within the military system. *Manual for Courts-Martial, United States, 1951*, para. 127; (*Augenblick* Court-Martial Record, Vol. VII, p. 402; *Juhl* Record, Defendant's Ex. 1 (Advice of Staff Judge Advocate) p. 8, A. 404). Accordingly, in each case the law officer could not know, during the trial, that the case would not be subject to collateral review by *habeas corpus*.

[15] See the dollar limitation on federal question and diversity jurisdiction. 28 U.S.C. 1331, 1332. This limitation has been applied in cases where plaintiff attempted to enjoin federal officials from alleged violation of Constitutional rights. *Giancana v. Johnson*, 335 F. 2d 366 (C.A. 7), certiorari denied, 379 U.S. 1001; *Wolff v. Selective Service Local Board No. 16*, 372 F. 2d 817, 826 (C.A. 2); *Boyd v. Clark*, 287 F. Supp. 561 (S.D.N.Y.) (three-judge court), appeal pending, No. 490, this Term. In such cases, the jurisdictional limitation may bar access to all courts since the State courts may hold that they have no power to grant relief. See Hart and Wechsler, *supra*, at 388–391.

subject to review by the Court of Military Appeals. That court has jurisdiction to review all cases reviewed by a board of review (10 U.S.C. 867(b)); and the board of review is required to review every case in which the sentence "affects a general or flag officer or extends to death, dismissal of a commissioned officer, cadet, or midshipman, dishonorable or bad-conduct discharge, or confinement for one year or more." 10 U.S.C. 866(b). Juhl was sentenced only to reduction in rank, partial forfeiture of pay, and confinement for six months. (A. 404). Accordingly, his case was not eligible for review by a board of review or the Court of Military Appeals, but was reviewed only by the convening authority (which reduced the sentence (*ibid.*)).

The finality provisions of Article 76, however, are not confined to cases which are reviewed or reviewable by the Court of Military Appeals or board of review. Finality is conferred on sentences "as approved, reviewed, or affirmed as *required by this chapter*" (emphasis added), and the statute then provides that "all action taken pursuant to [such] proceedings [is] binding upon all * * * courts"—without differentiation as to the levels of review available or actually traversed.

A provision which defines the availability of appellate review in terms of the severity of the sentence imposed is clearly a reasonable option in an appellate system, since it serves to confine the labors of the ap-

pellate tribunals to those cases having the most serious impact on the defendant."[16]

The Constitution, as interpreted by this Court, and the Uniform Code and the *Manual for Courts-Martial*, as interpreted by the Court of Military Appeals, remain binding on the law officer at all courts-martial, regardless of whether the sentence ultimately imposed renders the case appealable. Indeed, in many cases (including Juhl's), the defendant's potential liability under the charges for which he is tried is above the jurisdictional minimum; thus the law officer during trial makes his rulings in light of the knowledge that a sentence following conviction may bring the case within the appellate jurisdiction of a board of review and the Court of Military Appeals.[17] There is no reason to believe that, in limiting the jurisdiction of the Court of Military Appeals and boards of reviews to cases involving sentences of more than the specified severity, Congress intended to give military defend-

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[16] See *Griffin* v. *Illinois*, 351 U.S. 12, 21 (concurring opinion of Frankfurter, J., conceding "the right of a State to make an appropriate classification [of criminal appeals], based on differences in crimes and their punishment"); cf. *Gallagher* v. *Quinn*, 363 F. 2d 301 (C.A.D.C.), certiorari denied, 385 U.S. 881 (sustaining provision of Article 67 providing for mandatory review by Court of Military Appeals in all cases of general or flag officers, and discretionary review in all other non-capital cases); *Barry* v. *Mercein*, 5 How. 103 (applying Section 22 of First Judiciary Act, 1 Stat. 84, limiting this Court's appellate jurisdiction in civil cases from circuit courts to cases where the matter in dispute exceeds $2000).

[17] Juhl faced a maximum sentence of 16 years, 3 months, under the charges for which he was tried (A. 404).

ants with lesser sentences an alternative remedy in the Court of Claims."

V

THE JENCKS ACT DOES NOT REQUIRE THAT NOTES FOUND NOT TO BE A "SUBSTANTIALLY VERBATIM RECITAL OF AN ORAL STATEMENT" MUST BE MADE PART OF THE RECORD FOR APPELLATE REVIEW

Respondent Augenblick is plainly in error in contending (Brief, pp. 13, 35–38) that the law officer was in "flat defiance" of subsection (c) of the Jencks Act, 18 U.S.C. 3500(c), in failing to call for examination of Mendelson's notes *in camera* and in failing to make them part of the record. Although the portions of that subsection that Augenblick quotes do indeed speak of an *in camera* inspection and of availability of a statement to an appellate court, respondent overlooks the fact that subsection (c) applies only "[i]f the United States claims that *any statement ordered to be produced under this section* contains matter which does not relate to the subject matter of the testimony of the witness * * *." 18 U.S.C. 3500(c) (emphasis added). In other words, subsection (c) is a procedure for excising arguably irrelevant material in a statement that otherwise conforms to the definition of "statement" contained in the Jencks Act, and that has been ordered produced. The Jencks Act has *no* mandatory procedure for dealing with the question that faced the law officer here: Whether or not the

[18] It should also be noted that persons who receive sentences too light for appellate review may still apply to the appropriate correction board for relief. And here Juhl did make such an application to the Air Force Board for Correction of Military Records. (A. 417–420).

notes were "statements" producible under the Act.[19] Indeed, the decisions of this Court indicate that for this inquiry it is the characterization of the notes or reports by the investigator who wrote them down that is most relevant and helpful and that mere examination of the notes is not well calculated for determining whether they were a "substantially verbatim recital" producible under the Act. See *Campbell* v. *United States*, 365 U.S. 85; *Campbell* v. *United States*, 373 U.S. 487.

VI

THE "REASONABLE DOUBT" STANDARD FOR DETERMINING WHETHER ERROR WAS HARMLESS DOES NOT APPLY IN ASCERTAINING WHETHER OR NOT ERROR WAS COMMITTED

The Court of Claims in its *Augenblick* opinion conceded that "[e]very violation of the protections afforded by the Jencks Act does not, in and of itself, amount *ipso facto* to a violation of the Due Process Clause" (A. 338). The court concluded that it must "explore the special circumstances of the case to determine if the statutory violations so fatally infected the court-martial proceedings against plaintiff that he was unconstitutionally deprived of a fair trial." *Ibid.* In listing the "combination of factors" that led the court to conclude that the Jencks Act violations "fatally infected" the court-martial, the Court of Claims

[19] See *Palermo* v. *United States*, 360 U.S. 343, 354: "The statute itself provides no procedure for making a determination whether a particular statement comes within the terms of (e) and thus may be produced if related to the subject matter of the witness' testimony."

stated that "[t]he first [factor] is that Hodges was the all-important prosecution witness" (A. 339). In our main brief, we disputed this statement, pointing out that the court-martial found Augenblick innocent of the charge of oral sodomy about which Hodges testified and instead found him guilty of a lesser charge supported by the testimony of the two police officers—testimony unaffected by the alleged Jencks Act violations.[20]

[20] In attempting to support the conclusion of the Court of Claims that Hodges' testimony was important to the conviction, respondent Augenblick states (p. 51): "Moreover, the Board of Review also buttressed its appellate affirmance of Commander Augenblick's conviction of a lesser offense to that of sodomy in resolving inconsistencies within the stories of the arresting police officers by relying on Hodges' testimony as corroboration of the essential thrust of the officers' testimony." The brief then quotes a sentence from the Board's opinion. However, if the entire paragraph from which that concluding sentence was taken is read (A. 46–47), it becomes clear that the Board was considering contentions that there were conflicts of testimony *between* the police officers, and it resolved these alleged inconsistencies by analyzing *their* testimony; the Board referred to the testimony of Hodges only to resolve separately alleged inconsistencies within *his* testimony. In particular, we note that the record references made by the Board in the sentences immediately preceding the sentence quoted by respondent Augenblick (A. 47) are references solely to the testimony of the police officers.

Nor is there substance to Augenblick's contention that "Hodges alone could testify to circumstances substantiating the 'knowingly and willingly' specification." (Brief, p. 52). The testimony of the police officers was ample proof of scienter. (A. 263, 270–272, 276–277, 297–299, 301–303). Indeed, the only portion of Hodges' testimony which could have been taken as further substantiation of the charge that Augenblick acted "knowingly and wilingly" was the portion in which Hodges stated that Augenblick committed an act of oral sodomy. (A. 189–190). The court-martial clearly did not accept this portion of

Respondent Augenblick now contends that we have failed to satisfy the standard for harmless error laid down in *Chapman* v. *California*, 386 U.S. 18, because it cannot be said beyond a reasonable doubt that Hodges' testimony did not contribute to his conviction, Brief, p. 51–52). This contention, however, confuses the issue. The harmless error doctrine is drawn into issue only *after* it is established that error has taken place. And in the case of a collateral attack on a court-martial, the harmless error doctrine becomes an issue only after it is established that constitutional error has taken place, since no other type of error is a basis for collateral review.[11]

Here, unlike *Chapman* v. *California*, it is not conceded that a constitutional violation took place. Indeed, not even the Court of Claims asserted that once it found Jencks Act violations, relief was automatic in the absence of a showing beyond a reasonable doubt

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Hodges' testimony, since it found Augenblick not guilty of that offense.

Finally, Augenblick argues that Hodges' testimony at the pretrial proceedings played a vital role in the decision to convene the court-martial (Brief, pp. 50–52). This is undoubtedly correct, but immaterial. Augenblick had no Jencks Act rights of discovery at the pretrial proceedings and, as a result, did not make a motion for production under the Jencks Act until the court-martial itself. (A. 193–195). Thus, the only pertinent inquiry is whether Hodges' *trial* testimony was surrounded by prejudicial Jencks Act violations. It was this testimony that the members of the court trying guilt or innocence in no way relied upon.

[11] Again, assuming only *arguendo* that any collateral review is available in the Court of Claims. (Jurisdictional error, in the traditional sense, if open to review by the Court of Claims, would, we concede, be *per se* grounds for relief.)

that they were harmless. On the contrary, its conclusion that a constitutional violation did occur crucially depended on its assessment of the overall effect of the alleged Jencks Act violations—i.e., on its ruling that these statutory violations so "fatally infected" the proceedings as to violate due process. This conclusion, in turn, rested on the court's finding that Hodges' testimony played a crucial role in Augenblick's conviction. Respondent, of course, bears the burden of establishing that a constitutional violation took place, a burden that we believe was not met in this case. Thus, until Augenblick can demonstrate not only that there were Jencks violations but also that they were significantly related to critical testimony, there is no showing that a constitutional violation occurred, and the "reasonable doubt" test for harmless error under *Chapman* is not reached.

A contrary rule, holding that a conviction is void on due process grounds whenever the prosecution fails to prove beyond a reasonable doubt that a Jencks Act violation did not affect the outcome, would result in sustaining collateral attack on court-martial convictions (and on state convictions) in any case where reversal on direct appeal of a federal conviction would occur. This would be tantamount to holding that the Jencks Act as interpreted and applied in the federal courts has been incorporated *in toto* in the due process clause—a result that both this Court and the Court of Claims have disavowed. *Scales* v. *United States*,

367 U.S. 203, 257–258; see *Augenblick* opinion (A. 338).[22]

VII

CONGRESS IS CONTINUING TO FULFILL ITS RESPONSIBILITY FOR PROVIDING A FAIR AND RELEVANT SYSTEM OF MILITARY JUSTICE

On October 24, 1968, the President signed into law the Military Justice Act of 1968, Public Law 90–632, 82 Stat. 1335. This Act makes a number of changes in the Uniform Code of Military Justice, designed to strengthen protection of the rights of accused servicemen. A key provision, formulated to eliminate any possible "command influence," gives the accused in general and special courts-martial the right to obtain a court composed only of a military judge (the Act redesignates law officers as "military judges"). (Section 2(2), amending Article 16 of the Code.) The Act provides that the military judges of general courts-martial must be designated by the Judge Advocate General or his designee; that neither the convening authority nor any member of his staff shall prepare or review any fitness report of a military judge so designated regarding his performance as a military

[22] Respondent Augenblick argues that "the notion of 'harmless error' has received a narrow and limited applicability by this Court in assessing Jencks Act violations," citing *Rosenberg* v. *United States*, 360 U.S. 367 (Brief, p. 52). This is true in direct appeals from federal convictions, where the issue is whether Jencks Act error occurred. But if the same test is applied to vitiate court-martial and state convictions on due process grounds whenever a Jencks Act violation has occurred, the distinction between direct review of federal convictions and collateral review of courts-martial and state convictions would to that extent be obliterated.

judge; and that a military judge qualified for duty on a general court-martial may be assigned to other duties only by or with the approval of the Judge Advocate General. (Section 2(9), amending Article 26.) The Senate Committee Report explains:

> The intent is to provide for the establishment within each service of an independent judiciary composed of military judges certified for duty on general courts-martial, who are assigned directly to the Judge Advocate General of the service and are responsible only to him or his designees for direction and fitness ratings. * * *

S. Rep. No. 1601, 90th Cong., 2d Sess., at 7.

Other provisions of the Act authorize deferment of confinement pending completion of appellate review (Section 2(24), amending Article 57); give an accused an absolute right to refuse trial by summary court-martial (Section 2(6), amending Article 20; see S. Rep. No. 1601, 90th Cong., 2d Sess., at 6); redesignate the boards of review as "courts of military review" and make certain changes in the organization of these tribunals (Section 2(27), amending Article 66), in order "to provide a single appellate body for the review of court-martial cases within each service, to improve and enhance the stature and independent status of these appellate bodies, and to provide for sound internal administration within these courts of military review." S. Rep. No. 1601, 90th Cong., 2d Sess., at 14.

These provisions, we believe, emphasize the determination of Congress to protect the rights of servicemen by improving the quality of proceedings within

the military system. This continuing congressional attention to improvement of court-martial procedures and review underscores why it is particularly inappropriate for the Court of Claims to assume authority to conduct wide-ranging re-examinations of military proceedings, as it has done in the instant cases, in the absence of statutory authority to do so and in contravention of plain congressional design to the contrary.

Respectfully submitted.

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